

ORIGINAL

1
2 UNITED STATES DISTRICT COURT
3 SOUTHERN DISTRICT OF NEW YORK
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4 YEMISI AKINYEMI,

5 PLAINTIFF,

Index No.
07CV4048

6 - against -

7 MICHAEL CHERTOFF, Secretary,
8 Department of Homeland Security,

DEFENDANT.
-----X

10
11 DATE: October 26, 2007

12 TIME: 1:31 P.M.
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16 EXAMINATION BEFORE TRIAL of the Defendant,
17 MICHAEL CHERTOFF, Secretary, Department of Homeland
18 Security, by a witness, ELBA J. RILEY, taken by
19 the Plaintiff, pursuant to Notice, held at the
20 U.S. Department of Justice, U.S. Attorney's Office,
21 Southern District of New York, 86 Chambers Street,
22 New York, New York 10007, before Sharon Dirzis, a
23 Stenotype Reporter and Notary Public of the State
24 of New York.
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3 A P P E A R A N C E S:

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5 K.C. OKOLI, ESQ.
6 Attorney for the Plaintiff
7 330 Seventh Avenue
8 15th Floor
9 New York, New York 10001

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9 U.S. DEPARTMENT OF HOMELAND SECURITY
10 U.S. CUSTOMS AND BORDER PROTECTION
11 Attorneys for the Defendant
12 One Pennsylvania Plaza
13 11th Floor
14 New York, New York 10119
15 BY: CYNTHIA J. PREE, ESQ.
16 Assistant Counsel

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14 MAURY R. WINKLER, ESQ.
15 Attorney for ELBA J. RILEY
16 Military Park Building
17 60 Park Place
18 Suite 1104
19 Newark, New Jersey 07102

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19 U.S. DEPARTMENT OF JUSTICE
20 U.S. ATTORNEY'S OFFICE
21 SOUTHERN DISTRICT OF NEW YORK
22 86 Chambers Street
23 New York, New York 10007
24 BY: JOHN D. CLOPPER, ESQ.
25 Assistant United States Attorney

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2 E L B A J. R I L E Y, called as a witness, having
3 been first duly sworn by a Notary Public of the State
4 of New York, was examined and testified as follows:

5 EXAMINATION BY

6 MR. OKOLI:

7 Q Please state your name for the record.

8 A My name is Elba J. Riley.

9 Q Please state your address for the record.

10 A My address is c/o U.S. Customs and Border
11 Protection, 1100 Raymond Boulevard, Newark,
12 New Jersey 07102.

13 Q Good afternoon. My name is K.C. Okoli, and
14 I represent the plaintiff in this lawsuit which is
15 brought against the treasury secretary. I'll be
16 asking you a couple of questions at this hearing on
17 this lawsuit.

18 What I ask of you is for your best
19 recollection. If I ask you a question and you don't
20 understand it, please let me know, and I'll either
21 repeat the question or ask it in a way that you do
22 understand.

23 I believe that other than, perhaps, any
24 objections that may be made, this should be a very
25 short deposition, but in the event that you wish to

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2 can serve it upon me. I'll accept service.

3 MS. PREE: You can also serve it on
4 CBP, too.

5 MR. OKOLI: Let the record reflect
6 that both the CBP and private attorney for
7 Ms. Riley would accept service of any
8 subpoena on her behalf.

9 Q What's your place of birth?

10 A San Sebastian, Puerto Rico.

11 Q For the record, what is your race?

12 A Hispanic.

13 Q Who is your employer?

14 A CBP.

15 Q What?

16 A Customs and Border Protection.

17 Q What's your current job title?

18 A My current title is import specialist.

19 Q What's your highest level of education?

20 A Bachelor's degree.

21 Q What's your major?

22 A Foreign languages.

23 Q When did you graduate with a Bachelor's
24 degree, what year?

25 A 1993.

1 RILEY

2 A Eleven.

3 Q When you were initially hired by the CBP,
4 were you required to complete a probationary period
5 as part of the employment?

6 A Yes.

7 Q When did that probationary period start?

8 A January 2004.

9 Q When did it end?

10 A January 2006.

11 Q During the time of probation, who was your
12 supervisor?

13 A I don't recall. We have so many. We have
14 different supervisors.

15 Q Do you recall any of your supervisors?

16 A Brian Talrymple, T-A-L-R-Y-M-P-L-E.

17 Q Do you know Mr. Talrymple's title?

18 A He's a supervisor for inspectors.

19 Q Any other supervisors of yours that you
20 recall during the time of your probation?

21 A Joseph Mannucci.

22 Q Could you please spell that?

23 A M-A-N-N-U-C-C-I.

24 Q He was also your supervisor?

25 A Supervisor, also.

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2 you ever see off your parents at the airport or
3 traveling from Port Elizabeth Seaport?

4 MR. WINKLER: I'll object. Asked and
5 answered.

6 Q You can go ahead and answer.

7 Is it your testimony that at no time did
8 you ever see off your parents, between 2003 and 2005,
9 see them off travel from the airport?

10 MR. WINKLER: Are you saying seeing
11 them off for travel?

12 MR. OKOLI: Yes.

13 A Yes, that's right. They have never been
14 here since I have been here.

15 Q Have you ever seen any relation off at the
16 gate area of an airport?

17 A I would like to invoke my Fifth Amendment
18 not to answer that question.

19 MR. OKOLI: Shall we call the judge?

20 MR. CLOPPER: Are you going to invoke
21 that?

22 MR. WINKLER: Yes.

23 MR. CLOPPER: Hold on.

24 Just as a suggestion, do you think it
25 would be fruitful, at all, to have you go

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2 Counsel's Office of U.S. Customs and Border
3 Protection, Cynthia Pree.

4 We also have a stenographer here, and
5 we are currently on the record, and the
6 stenographer is taking down a transcript.

7 THE COURT: Good. So, what is the
8 problem?

9 MR. OKOLI: Good afternoon, Judge. My
10 name is K.C. Okoli.

11 I posed a question which I will have
12 the stenographer read out and then the
13 objection of counsel and the witness
14 invoking Fifth Amendment privilege.

15 Judge, do you hear me?

16 THE COURT: Yes.

17 MR. OKOLI: Should I ask the
18 stenographer to read the question that I
19 posed and the objection of counsel?

20 THE COURT: Yes, let's do that.

21 (Whereupon, the referred to portion of
22 the record was read back.)

23 THE COURT: Who wants to go first in
24 arguing about whether there is a proper
25 invocation of the Fifth Amendment

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2 privilege?

3 Mr. Clopper, do you have a statement
4 to make here or do you want to let
5 Mr. Okoli make the objection here?

6 MR. CLOPPER: Your Honor, I think I'm
7 going to allow Mr. Okoli state the basis
8 for the reasons seeking a ruling, and then
9 perhaps Mr. Winkler might have something to
10 say.

11 Actually, I have no view one way or
12 the other on the invocation of the
13 privilege.

14 THE COURT: Okay.

15 MR. OKOLI: Your Honor, just by way of
16 background briefly, the lawsuit is a suit
17 that is brought by my client, a black
18 woman, who claimed that she was treated
19 differently and terminated from her
20 employment when, in fact, other people had
21 done similar things or more egregious
22 things and are still working for the
23 Customs.

24 That's the general thing, and then the
25 question is -- one of the things is as that

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particular matter goes, what they had against her was that she was found in a restricted gate area seeing her husband off who was then in bereavement and traveling to go take care of burial arrangements in Nigeria.

That is the reason why she lost her job with the Customs. At the time she was on probation and during the investigation of this, she mentioned other people who were also on probation and did similar things or worse things, and they are still working for the U.S. Customs, and she claims that the reason she was let go and not these people is she's a black woman of Nigerian national origin, and my question to the witness essentially is to help determine whether, in fact, she was also at a restricted area at the airport seeing off relations, and she's claiming the Fifth Amendment.

My understanding of the Fifth Amendment -- in fact, the wording of it clearly makes it applicable to a criminal

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case.

If I may, the Fifth Amendment, that particular portion says "nor shall be compelled in any criminal case to be a witness against himself."

This is the exact wording of the Fifth Amendment, so I contest -- first of all, I don't think there's anything in that question that would generate the invocation of the Fifth Amendment, and even if there was, being that this is a civil case and not a criminal case, I don't believe the Fifth Amendment applies.

THE COURT: Well, I disagree with you on your legal premise.

The Fifth Amendment can be invoked in a civil lawsuit and indeed in certain other contexts, if the witness has a well-founded fear that her answer might tend to incriminate her, perhaps if combined with other information, and I gather that Mr. Winkler, her personal attorney, has discussed this matter with her and has advised her to invoke the Fifth Amendment

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2 privilege, and she has done so.

3 That might conceivably give some
4 advantage to plaintiff in this lawsuit
5 because in a civil lawsuit, unlike a
6 criminal prosecution, sometimes a negative
7 inference is drawn when someone asserts
8 their privilege against self-incrimination,
9 so this is not something that people do
10 lightly, but generally they are allowed to
11 invoke their Fifth Amendment privilege in a
12 civil deposition, and sometimes there is a
13 claim that the witness could not possibly
14 have any worry about any sort of criminal
15 prosecution by giving an answer to this
16 question.

17 I gather that this is a type of
18 conduct which some people may think of as
19 criminal. I don't know if we're talking
20 about a felony here, but some sort of crime
21 may flow if people do what the plaintiff is
22 apparently accused of doing which is to
23 bypass Homeland Security to see a relative
24 at an airport. I don't know whether that's
25 any big crime. Maybe it's serious enough

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2 have you ever seen any relative off at the
3 gate area of any airport, and I think
4 Mr. Winkler is thinking along the same
5 lines that I have been, but, Mr. Winkler,
6 if you want to say something on the record,
7 you can.

8 MR. WINKLER: You have articulated my
9 position very accurately.

10 THE COURT: All right. I don't have a
11 clear idea what other connection, if any,
12 Ms. Riley has with this particular case.

13 Is it that she is just a similarly
14 situated person who was employed in a job
15 similar to the plaintiff?

16 MR. OKOLI: Yes, Your Honor. I think,
17 in fact, they were hired the same day or a
18 day apart from each other.

19 THE COURT: Well, you may be able to
20 explore more this line of questioning with
21 other witnesses, but this witness has to
22 consider her own interests; her interests
23 in her job and even the possibility of
24 criminal prosecution, so she does have her
25 right, and she can invoke that right in a

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2 civil deposition, and, as I say, sometimes
3 somebody such as Judge Peck in a trial
4 situation may give some sort of instruction
5 to the jury that they can draw some
6 negative inference from the fact that the
7 witness chose not to answer that question
8 prior to trial, but I'm not going to order
9 her to answer it.

10 MR. OKOLI: Thank you, Your Honor.

11 I just wish to note my exception on
12 the record.

13 THE COURT: That's fine. If everyone
14 is satisfied, I'm going to hang up, and I'm
15 available the rest of this afternoon.

16 If there's another problem, place
17 another conference call.

18 MR. CLOPPER: Thank You, Your Honor.

19 (Whereupon, the conference telephone
20 call was ended.)

21 MR. OKOLI: I just have one question
22 to clarify.

23 Q When you began employment, you started at
24 level seven, and you're now at level eleven.

25 Is it fair to say you received a promotion?

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2 A Yes.

3 MR. OKOLI: That is it. No further
4 questions.

5 MR. CLOPPER: Let's take a brief
6 recess.

7 (Whereupon, a brief recess was taken.)

8 MR. CLOPPER: I have no questions at
9 this time. We can conclude the deposition.
10 Thank you very much.

11 (Whereupon, at 2:23 p.m., the
12 Examination of this Witness was concluded.)

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ELBA J. RILEY

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19 Subscribed and sworn to before me

20 this ____ day of _____, 2007

21 _____

22 NOTARY PUBLIC

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